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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FREDERICK W.A. KNIGHT,

Petitioner,

– against –

U.S. FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, CENTENNIAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, ROYAL INSURANCE COMPANY OF AMERICA, NORTHWESTERN NATIONAL INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, and CONTINENTAL INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 20, 1987

118 pp

Questions Presented

1. Whether the court of appeals' decision is inherently unsound and far-reaching and will adversely affect public policy in that the court wrote new law on the law of nondisclosure as ground to void a policy of marine insurance by the insurers and whether the ancient doctrine of "uberrimae fidei" now requires the attention of this Court?

2. Whether summary judgment was appropriate in a case of first impression where genuine issues of fact exist as to materiality in a marine insurance context and whether under the circumstances of the case the district court and court of appeals properly decided the case by summary judgment taking such case away from the jury?

3. Whether by cancelling an insurance policy on one ground when other grounds were known to the insurers, the insurers waived

their right to cancel the policy on other grounds, or at a minimum, whether the notices of cancellation constituted an admission against interest as to materiality?

4. Whether the district court erred in finding, sua sponte, that there had been fraud on the part of the assured as the sole basis for the decision when there had been no fraud and no allegations or pleading of fraud and no facts of record to support a finding of fraud by the court and whether the court of appeals properly ignored the issue of fraud expressly raised on appeal as an error of the district court resulting in manifest injustice?

The Parties

Plaintiff, petitioner herein, is Frederick W.A. Knight, a Dutch citizen and resident of Bangkok, Thailand, owner of a

collection of ancient statuary lost aboard the M/V ALIAKMON RUNNER on or about February 7, 1983. Mr. Knight was the insured on an agreed value cargo policy in the amount of $30,630,750 issued by nine American insurers and reinsured in the London market in October 1982.[1]

Defendants, respondents herein, are the primary insurers on the insurance policy.

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1 This petition is filed on behalf of Mr. Knight, an individual, and therefor pursuant to Rule 28.1 there is no corporate disclosure.

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The opinions pertinent to this Petition are the October 22, 1986 Opinion of the United States Court of Appeals, 804 F.2d 9 (2nd Cir. 1986), (A-1), the February 10, 1986 Opinion of the district court, 1986 AMC 1230 (S.D.N.Y. 1986) (A-15) and the unreported Opinion of the district court dated March 27, 1986 and filed March 28, 1986 (A-42).

Jurisdiction

The Judgment of the Court of Appeals was entered on October 22, 1986. (A-49). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Provisions and Rules Involved

This case involves Rule 56 of the Federal Rules of Civil Procedure. The Text of Rule 56 is set forth at A-51 of the Appendix.

STATEMENT OF THE CASE

A. Summary of Pertinent Facts

Frederick W. A. Knight is a collector of Oriental art and owner of a collection of 222 antique stone and bronze sculptures which he acquired during the period 1973 to 1979 from temples in rural Thailand. The sculptures were appraised at $30,307,500 in 1981. On or about February 7, 1983, the entire collection was lost aboard the ALIAKMON RUNNER when the vessel sank on a voyage from Singapore to Piraeus, Greece where the collection was to be sold.

At the time of the loss the collection was covered by an agreed value insurance policy in the amount of $30,630,750 issued by nine primary insurers, defendants herein. The policy was reinsured on the London market.

Following the loss, Mr. Knight attempted to recover on the insurance policy, however, the insurers refused to pay. Following months of investigation by the insurers into all facts and circumstances prior to and after their acceptance of the risk, in early April 1983 the insurers sent Mr. Knight nine separate notices of cancellation, asserting that the policy was void ab initio for the reasons stated therein. The notices of cancellation were specific as to the grounds for cancellation and, except for the amount of the premium, were virtually identical. The notice of cancellation of the Insurance Company of North America (INA), the lead underwriter, stated as follows:

April 5, 1983

Mr. Frederick W.A. Knight
c/o H.E. Yerkes and Associates, Inc.
127 John Street
New York, N.Y. 10038

Re: 57 crates said to contain stone and bronze Buddhas and Fable Gods shipment Singapore - Piraeus

Dear Sir:

Our investigation leads us to the conclusion that you failed to disclose facts material to the risk and misrepresented pertinent facts material to the risk. We believe that you removed the buddhas and fable gods from Thailand contrary to the laws of that country, and acquired the buddhas and fable gods contrary to the laws of that country.

The contract of insurance is therefore void ab initio. We are returning your premium check in the amount of $4,732.45.

The above is without prejudice to any and all rights and additional defenses, all of which are specifically reserved.

Yours very truly,
INA/AETNA

Anthony S.C. Wong
Resident Vice President
Marine & Aviation

Contrary to the assertions in the cancellation notice, the assured had in fact

disclosed to the insurers, prior to their acceptance of the risk, that the artwork had been removed from Thailand contrary to the laws of the country.

At the time the cancellation letters were sent, the insurers knew other "facts" about the collection which were not given by the insurers as grounds for cancelling the policy, including the "fact" that in the year prior Mr. Knight had received a notice of cancellation on the same collection from insurers in the London market. That prior notice of cancellation was made under concededly questionable and conflicting circumstances, and was not disclosed by Mr. Knight to the insurers in the American market at the time of his seeking insurance in 1982 because he believed that the prior notice of cancellation was unfounded and contained false and untrue information which was and could not be material to the risk.

Those circumstances included the facts that 1) a survey of the collection ordered by the prior insurers had found the pieces to be "genuine", 2) the Managing Director of the insurers' agent in Singapore had told Mr. Knight that the cancellation was not based on information reported to the insurers; 3) the insurers' agent in Singapore had further assured Mr. Knight that everything was in order; and 4) the cancellation was in fact prompted by an anonymous telephone call to the London broker claiming a fraud was about to take place. These cirumstances were known to Mr. Knight at the time of the prior cancellation in 1981 and resulted in his belief that the cancellation notice was based on false and untrue information and was not a "fact" material to the risk.

When Mr. Knight approached the American market in 1982, he disclosed every possible

material fact regarding the collection to his insurers, including the fact that he had purchased the collection for "very moderate prices," had originally sought insurance in the area of $15 million, had previouly sought insurance on the same collection and did not wish to approach the London market with the risk. The insurers did not ask a single question of the assured or require any further information, despite the fact that whether or not there has been a prior cancellation on the same goods is routinely asked by the insurers in their Marine Cargo Application Form. The insurers did not request a survey, despite the fact that time was not of the essence and the goods were not of the type or amount usually covered.

Following the loss of the collection in 1983, all of there circumstances of the prior cancellation, including the fact that it

alleged the pieces were "grossly over-valued" and "replicas," were known to the American insurers at the time of their cancelling the policy. Yet neither the prior cancellation nor the fact that the sculptures were allegedly over-valued and replicas, were considered "facts material to the risk" at the time of cancellation in April of 1983 and neither the prior cancellation nor its grounds were given as a ground for cancelling the policy.

In July, 1983, Mr. Knight commenced an action against the insurers for breach of contract in the U.S. District Court, Southern District of New York.

It was not until the insurers filed an amended answer in October 1984, 20 months after having cancelled on other grounds and on the eve of moving for summary judgment, that the insurers raised the prior cancellation as a defense to the contract.

B. The Proceedings Below

1. The Proceedings in the District Court

On July 8, 1983, Mr. Knight commenced an action against his insurers in the United States District Court, Southern District of New York.

During the course of proceedings, the defendant insurers, through their counsel and by insinuation and innuendo, repeatedly accused the assured without proof or basis, of fraudulently misrepresenting the authenticity of the art work and fraudulently procuring the insurance at issue. However, there were no facts of record indicating or establishing fraud and fraud was never pleaded or given as a ground for cancelling the policy.

On April 10, 1984, the assured moved to amend his pleadings to include a prayer for punitive damages, alleging that the insurers had acted in bad faith in investigating the loss and cancelling the policies. On May 6, 1984, the court postponed decision on the motion to amend the pleadings regarding the assured's claim of bad faith on the part of the insurers until after a decision on the motion for summary judgment to be made by the insurers.

On November 30, 1984, the defendant insurers filed a motion for summary judgment alleging nondisclosure of certain alleged "material facts" as grounds for voiding the policy ab initio. One of the grounds alleged was a prior cancellation on the same collection by insurers in the London market on grounds of alleged over-valuation. The only "evidence" of its materiality submitted was

the deposition testimony of the insurers that it was material to the risk.

In opposition to summary judgment the assured put before the district court the insurers' letters of cancellation, none of which mentioned the prior cancellation as a material nondisclosure, although they knew about it when they cancelled the policies in 1983.

The assured also put before the district court a Report of Graham Miller, the prior insurers' agent in Singapore which contained information that upon examining the artwork, the surveyor chosen by the prior insurers had reported the pieces to be largely "genuine." Deposition testimony of the assured was also presented that he had been told by the insurers' agent in Singapore that the cancellation was not based on the information reported to

the insurers. Also the deposition testimony by the broker was submitted that the prior cancellation would have been material "if true." In addition, the assured submitted two affidavits by the leading expert in the field stating that something which is based on a falsehood or fiction cannot possibly be "material to the risk" of an underwriter and is not something which the assured has to voluntarily disclose, absent inquiry, in seeking marine insurance. The assured also submitted an exhibit to the district court showing a substantial overlap between the London insurers who had previously cancelled the risk in 1981 and the companies who insured and reinsured the same risk in 1982. Finally, the assured submitted to the district court a document which had been given to the lead underwriter prior to acceptance of the risk indicating that the lead

underwriter had actual knowledge of the allegedly nondisclosed fact upon which the cancellation was based, as well as constructive knowledge of other facts which would have prompted a prudent insurer acting in good faith to inquire.

In an opinion and order dated February 10, 1985, the district court granted summary judgment, holding that the prior cancellation was a fact so material to the risk that reasonable minds could not differ. The circumstances of the cancellation were held to be "irrelevant" by the court. The court also stated that the defendants' own "post facto assertions of materiality" were self-serving and subject to credibility determinations by the trier of fact. Nevertheless, the court substituted itself for the trier of fact and found that it was a "matter of indisputable fact" that the prior cancellation would have

been material. The court did not address the issue of how nine insurers, and their counsel, had not considered the prior cancellation or the stated reasons therefor (i.e., alleged over-valuation and replicas) worthy of even mention in the cancellation letters. Nor did the court address the assured's pleadings and affidavits that the insurers had failed to act in good faith as these issues were tabled by the court until after decision on the insurers' motion for summary judgment.

In a subsequent opinion and order dated March 25, 1986, denying the assured's motion for reargument, without facts of record or sufficiency of pleadings, the district court stated it had found fraud in connection with the sole basis for granting summary judgment.

2. The Proceedings in the Court of Appeals

Appeal was taken taken to the Second Circuit, raising, inter alia failure of the district court to address issues of actual and constructive knowledge, lack of good faith on the part of the insurers, the district court's error in finding fraud, and error in applying the substantive law of nondisclosure.

By Judgment entered October 22, 1986, the Court of Appeals affirmed the district court's decision. In order to do so, it ignored the issues of burden of proof and that the lower court's decision had been improperly based on an erroneous finding of fraud. Finally, the Court of Appeals made new law in the substantive law of nondisclosure, holding that even if "the assured was reasonable in

his belief," the assured had to disclose information he believed to be false.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' DECISION IS FAR-REACHING AND WILL ADVERSELY AFFECT PUBLIC POLICY AND THE ANCIENT DOCTRINE OF "UBERRIMAE FIDEI" NOW REQUIRES THE ATTENTION OF THIS COURT

The public policy implications of the Second Circuit's decision as to the burden of disclosure under the doctrine of "uberrimae fidei" needs to be carefully considered and reviewed by this court. The Second Circuit encompasses the ports of New York and New Jersey and New York City is one of the major insurance markets of the world.

The doctrine of uberrimae fidei and the insurer's defense of non-disclosure to a policy of marine insurance after a loss is an "extremely powerful weapon" in the hands of

an underwriter. The strong possibility exists that such power can be abused if underwriters are able to make a practice of alleging non-disclosure as a ground for cancelling a policy after a covered loss. See C.T.I. v. Oceanus, (1982) Lloyd's Rep. 178.

The Second Circuit has handed down two conflicting decisions on the substantive law of non-disclosure in the span of less than a year, both of which discuss an assured's duty to disclose. Puritan Ins. Co. v. Eagle S.S. Co. S.A. 779 F.2d 866 (2nd Cir, 1985); Knight v. U.S. Fire 804 F.2d 9 (2nd Cir. 1986).

In Puritan, the Second Circuit viewed the "uberrimae fidei" standard as a two-way street, upholding a lower court decision (after trial) permitting the assured not to disclose a significant prior loss record.

> "... The majority appears to have indirectly reduced the effect [of] the doctrine of uberrimae fidei..." (Puritan at 875, J. Cardamone, dissenting)

The assured had submitted an application for marine insurance stating that in the previous policy year its premiums had exceeded losses, claiming a credit balance of 7.5%. The actual loss record for that year had been a deficit of more than 300%.

To support its decision the Puritan majority stated:

> A marine insurance policy 'cannot be voided for misrepresentation where the alleged misrepresentation was not relied upon and did not in any way mislead the insurer.' (cite omitted). Further, '[a] minute disclosure of every material circumstance is not required. The assured complies with the rule if he discloses sufficient to call the attention of the underwriter in such a way that, if the latter desires further information, he can ask for it.'

The Puritan dissent criticized the majority's decision, stating it permitted the

assured to make a game out of its duty of non-disclosure, playing each card as close to the vest as possible. Puritan at 874.

In Knight, the Second Circuit was more concerned with trumpeting its statistical affirmations of summary judgment than dealing with the difficult and complex issues presented. As a result, the court now requires an assured the disclose information which he reasonably believes to be untrue and which was in fact untrue. This result is a total distortion of the standard set forth by J. Learned Hand in Btesh v. Royal Ins. Co., Limited, of Liverpool, 49 F.2d 720 (2nd Cir. 1931) and allegedly reaffirmed by the Knight court:

> "The standard for disclosure is an objective one, that is, whether a reasonable person in the assured's position would know that the particular fact is material." (Knight at 13)

Furthermore, to arrive at such a far-reaching holding on summary judgment is in direct contradiction with the long-standing principle that "materiality in each case is a question of fact", Marine Insurance Act, 1906, Sec. 18(4), which has been endorsed by both the Ninth Circuit in Pacific Queen Fisheries v. Symes, 307 F.2d 700 (9th Cir. 1962) and the Fifth Circuit in Gulfstream Cargo Ltd. v. Reliance Insurance Co., 409 F.2d 974 (5th Cir. 1969).

It is also in direct contradiction with the position taken by Leslie J. Buglass a noted expert, author and lecturer in marine insurance who reviewed the basic facts in this case and submitted his opinion in two affidavits to the District Court stating that something which is false or untrue is not a "material fact" affecting the risk and that under the circumstances there was no duty to disclose the information.

The Second Circuit's decision approving the procedural vehicle of summary judgment to arrive at such a far-reaching conclusion is further in direct contradiction with this court's decision in MLanahan Universal Insurance Co., 26 U.S. (1 Peters) 170 (1828) which the Second Circuit cited to as authority in Puritan, Puritan Ins. Co. v. Eagle S.S. Co. S.A. 779 F.2d at 870, holding that in each case materiality in marine insurance is a question of fact for the jury.

The Second Circuit's decisions in Puritan and Knight have "muddied the waters" surrounding this important and ancient admiralty doctrine of "uberrimae fidei."

"Uberrimae fidei" was originally created by the English courts to protect what were at the time vulnerable London underwriters. Its initial application was directed at marine

insurance because the vessel or cargo to be covered was often at a great geographical distance and limitations on travel and communications prevented the underwriter from inspecting the risk. In other areas of insurance, such as fire and life, the principle has been modified over the years because of the practice of insurers to submit a questionnaire or application form and to ask questions and make inspections in order to obtain information. Hare & Case v. National Surety Co., 60 F.2d 909 (2nd Cir. 1932).

In today's era of worldwide global communications and office networks the need for a stricter standard in the area of marine insurance as opposed to non-marine insurance such a health property or life, has all but disappeared. However, courts have upheld the doctrine following the principle of stare decisis without consideration of its present viability.

It is significant to note that the lead underwriter, INA, has a Marine Cargo Application Form which it provides to marine insurance applicants, much in the same manner as non-marine applications. Question No. 11 on the marine application states:

> In the past five years, has your ocean cargo insurance policy been cancelled by an insurance company?

In the Knight case the assured was not provided with an application form and the underwriters failed to make any inquiries into the risk, including the inquiry as indicated in Question No. 11 regarding a prior cancellation.

The Second Circuit's decision also sanctions a wholly unfair procedure whereby the underwriter could make a general disclaimer, that is, nondisclosure of a material fact and then use the discovery process to uncover

facts which it then deems are material to the risk, requiring the assured after the loss, to disprove the negative, i.e. that the fact would not have been material to the risk. Furthermore, in the Knight case it permits the insurers to cancel the policy based on certain alleged nondisclosed "facts" and then later alter the grounds in a motion for summary judgment.

The present law would permit an assured to fill out an application for marine insurance in good faith, thinking it had provided the underwriter with all the necessary information, only to find its policy cancelled because it failed to disclose additional information not requested in the application or orally. This permits the insurers to be both judge and jury of a risk, after a loss has occurred.

If the courts insist on applying the outdated doctrine of "uberrimae fidei" they should also continue to apply the doctrine, which has always gone hand in hand with it, that materiality is always a question of fact.

In this regard the Second Circuit failed to follow this court's decision in M'Lanahan v. Universal Ins. Co., 26 U.S. 1 (Peters) 170 (1828) which held that "The question of materiality... to the risk, is a question for the jury".

The ability of an insurer to disclaim on the ground of nondisclosure is recognized by authorities and the courts as being an extremely powerful tool capable of abuse by the insurers. As stated by Anthony Diamond, Q.C. in "The Law of Marine Insurance - Has It A Future?", Lloyd's Maritime and Commercial Law Quarterly, February 1986:

> This is one of the central doctrines of the law of marine insurance and is an example of a rule which I personally would regard as rigid, inflexible, and out of date. The rule was already in my view rather too strict when it first emerged in the 18th century. My impression is that over the years, as a result of the developing case-law, it has become stricter still. It is now in some respects rather like the old Statute of Frauds in that a rule of law designed to prevent inequitable conduct being practised by one party on another can be misused by the second party to perpetrate inequity on the first party.
>
> I know, of course, it is said that reasonable underwriters do not ordinarily rely on non-disclosure except when they have other grounds for disputing a claim; for example, they may doubt its bona fides. But this defence of the rule cannot in my view be accepted for a moment; first because not all underwriters are reasonable underwriters; and secondly because the effect of the rule is sometimes to make underwriters the final judges of their own cause. I think that the experience of most legal practitioners is that over the years the present rule works a considerable amount of injustice.

This court has not addressed the issue of "uberrimae fidei" since the MLanahan decision almost one hundred and sixty years ago.

The Second Circuit has cited to MLanahan as authority in one recent decision and yet has rejected its holding in another. It is now incumbent on this court to clarify the contradiction between the rulings in these cases and to clarify the conflict between the liberalization of summary judgment and the well-established principle of marine insurance law which states that the question of whether a particular fact is material to the risk is always a question for the trier of fact.

II.

THE APPELLATE REVIEW OF SUMMARY JUDGMENT WAS IMPROPER AND REQUIRES THIS COURT'S SUPERVISION

The Court of Appeals' decision upholding summary judgment against the assured for nondisclosure of a "material fact" as a ground for voiding a policy of marine insurance ab initio has so far departed from the accepted and usual course of proceedings as to call for exercise of this Court's power of supervision.

This case is a case of first impression in two significant respects. One, it is the first time in over two hundred years of American and English law wherein a case involving an insurer's defense of nondisclosure to a policy of insurance was decided by means of the procedural device of summary judgment. Secondly, it is a case wherein the assured's

knowledge of the alleged "material fact" supported his reasonable belief that the "material fact" was in fact false or fictitious. Nevertheless, the district court granted summary judgment, improperly postponing decision on the insurers' lack of good faith and ignoring questions of burden of proof and dismissing the assured's prima facie case after having substituted itself as the trier of fact. The court of appeals affirmed, ignoring express issues raised by the assured on appeal and writing new law on the subject of an insurer's right to invoke the defense of nondisclosure and void a policy of insurance ab initio after the occurrence of a covered loss. In doing so, it diverged widely from the proper role of an appellate court in reviewing summary judgment, i.e., determining whether in light of the admissible evidence of record, the moving party had

met its burden of establishing no genuine issue of fact for trial.

The duty to disclose in the context of marine insurance has always required examination of what "a reasonable person in the assured's position" would believe to be material to the risk sought to be covered. Btesh v. Royal Ins. Co., Limited of Liverpool, 49 F.2d at 721. The issue requires consideration of all circumstances surrounding the nondisclosed fact and acceptance of the risk by the underwriters. Whether a nondisclosure is material is by definition a question of fact and has always been reserved for the trier of fact. Couch on Insurance, 2d (Ref.ed.) §38:82. Similarly, Arnould, Law of Marine Insurance and Average, §676 addresses the issue by citing the Marine Insurance Act, 1906, Sec. 18(4):

> "Whether any particular circumstance which is not disclosed, be material or not is, in each case, a question of fact." (Emphasis added).

The Second Circuit erred in ignoring the long line of well-settled cases and authorities, including decisions of the Supreme Court, holding that such a determination can only be made by the trier of fact.

The Supreme Court has expressly so held on two separate occasions, refusing the depart from the well-established principle:

> "It is well settled, that the operation of any concealment on the policy depends on its materiality is a subject for the consideration of a jury. Maryland v. Ruden, 10 U.S. (6 Cranch) 338, 340 (1810).
>
> "...the effect of the misrepresentation of concealment on the policy depends on its materiality to the risk this must be decided by a jury, under the direction of the court." Livington v. Marine Insurance Co., 10 U.S. (6 Cranch) 274, 279 (1810). (Emphases Supplied)

The Second Circuit's decision is also in

direct conflict with this Court's holding in MLanahan v. Universal Insurance Co., which it recently reaffirmed as authority on the precise issue presented here. See, Puritan v. Eagle S/S Co. S.A., 779 F.2d at 870. The underwriters in MLanahan urged that nondisclosure of a fact by the assured was so material to the risk that reasonable men could not differ and thus it need not be presented to a jury. The court rejected the underwriter's argument, stating:

> We think, then, that the exception insisted upon at the bar, cannot, upon principle or authority, be supported; and that the question of materiality ... to the risk, is a question for the jury ... The court may aid the judgment of the jury but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict, as upon a contested matter of fact, resolving itself into a mere point of law. (Emphasis supplied) Id. at 190.

Yet the distrct court in this case assumed the right to supersede this judgment of

the jury and decided a strongly contested matter of fact, resolving the issue as a point of law, and the court of appeals affirmed.

Moreover, in so doing, the district court and court of appeals ignored the burden of proof on the substantive point of law under consideration. The insurers bear the burden of proof of establishing an affirmative defense to an insurance policy by a preponderance of the evidence. Contractors Realty Company, Inc. v. Insurance Company of North America, 469 F. Supp. 1287 (S.D.N.Y. 1979); "...the devoir of persuasion rests with the insurers," Albany Insurance co. v. Wisniewski, 579 F. Supp. 1004 (D.R.I. 1984). This burden was not met and was ignored by the district court and court of appeals.

The record is replete with the fact that the insurers made no inquiries of the assured, despite actual and constructive knowledge of facts which would have caused a reasonable insurer acting in good faith to inquire, and did not pose standard questions regarding prior insurance to the assured which are routinely asked. After the loss, the insurers disclaimed, alleging nondisclosure of facts which had been specifically made known to the insurers, prior to their acceptance of the risk, and regarding which the assured had sought a clause protecting himself in the event of a loss. Then, over a year and a half after disclaiming on one ground, the insurers moved for summary judgment on other grounds, raising other alleged "material facts." Despite the pleadings and affidavits of record as to the insurers' lack of good faith, the record of proceedings

makes clear that decision on the assured's claim of lack of good faith on the part of the insurers was specifically excluded from consideration by the district court, in violation of the substantive law's requirements that both parties to a contract of marine insurance exercise the highest degree of good faith.

On appeal, the Second Circuit treated the case as a welcoming wagon for summary judgment, using it as a vehicle to extol the virtues of summary judgment and cite court statistics and conference studies on the procedure. The case itself was dealt with in a broad-brush, superficial manner, ignoring express issues raised by the assured on appeal, and creating new law on the law of nondisclosure in order to uphold the decision.

The Second Circuit has oversimplified the issues and failed to grasp the very complex issues regarding nondisclosure:

> Just what is material the decisions do not; and in the nature of things cannot exactly define . . . and indeed the books are somewhat vague as to how far he [assured] shall be charged at his peril with appreciating the materiality of what he does know... Btesh at 721.

The Knight court held that whether the prior cancellation was justified and whether the information therein was true is irrelevant to any finding as to materiality, even if the assured is reasonable in his belief. The assured must know to disclose information which he reasonably believes to be untrue. There is nothing in the record to support such a conclusion. The Court of Appeals fails to address the question of why an assured would consider information which is false to be material to the risk. In doing so, the court ignored the expert opinion of

Leslie J. Buglass, the leading expert in marine insurance who stated that "false information cannot materially affect [the] risk."

The court also summarily treats the numerous facts and testimony of record regarding the circumstances of the prior cancellation, holding:

> Knight's claim that the prior cancellation was unwarranted does not alter this conclusion. We are told that the materiality of information that an assured reasonably believes to be untrue is an issue of first impression, and we will assume for present discussion that Knight's belief in this case is reasonable. Under Knight's view, an assured would be permitted to withold an otherwise material fact such as cancellation whenever he reasonably believed the basis for the cancellation to be unjustified. Such an approach would unnecessarily complicate litigation over nondisclosure. Deciding whether the basis for the undisclosed prior cancellation was well-founded would become a mini-trial in itself. The sounder approach is to require an assured to communicate the information to the insurer before a policy is issued, so that the insurer can decide whether to accept the risk despite the prior cancellation. (Knight at 14) (A-10-11).

Thus the court of appeals assumes that something which is false or fictitious can be a "material fact," assumes "for present discussion" that the assured's belief is reasonable, and nevertheless proceeds to hold that the "sounder approach" is to require disclosure. Summary judgment is not the proper vehicle for such a determination. Such determination not only usurps the position of the jury in an area which heretofore has been exclusively reserved for the jury, but also improperly permits the court to weigh the evidence, eliminate credibility determinations, and write new law under F.R. Civ. P. 56.

III.

THE DISTRICT COURT AND COURT OF APPEALS MISAPPLIED THE STANDARD FOR SUMMARY JUDGMENT

This Court recently handed down three decisions on summary judgment under Rule 56 of the Federal Rules of Civil Procedure: Celotex Corp. v. Catrett, 106 S.Ct. 258 (1986); Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986); Matsushita Electric Industry Co. Ltd. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986). In each of the three opinions the majority insisted its decision was not a departure from the traditional summary judgment doctrine and from the decision of Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Rule 56 permits summary judgment only when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c). The burden of establishing the

nonexistence of a "genuine issue" is on the moving party and is a stringent one. 6 Moore §56.15(3), p. 56-466; 10A Wright §2727, p. 124.

Summary judgment cannot be granted unless it is clear a trial is unnecessary, Anderson v. Liberty Lobby Inc., 106 S.Ct. 2505 (1986), and any doubt as to the existence of a genuine issue for trial must be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970). Furthermore, on a motion for summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

None of these standards were applied in this case. The moving party, the insurers,

have not established that there is no genuine issue of fact, and have not met their burden under the substantive law of establishing entitlement to the defense by a preponderance of the evidence. Other than their own deposition testimony, which the district found to be self-serving and subject to credibility determinations, the insurers submitted no materials establishing the materiability of the nondisclosed fact. In opposition, the record contained the pleadings, testimony of the assured and broker, affidavits of a leading expert, and the cancellation letters themselves, all indicating that the alleged "material fact" was not material and in fact was not considered by the insurers at the time of cancellation to be material. Nothing was submitted by the insurers in reply to explain why the alleged material fact had not been considered material at the time of cancelling

the policy. Thus there were unexplained gaps in the materials which should have created inferences in favor of the non-moving party precluding summary judgment. Adickes v. S.H. Kress Co., 398 U.S. 144 (1970).

Moreover, had the burden of proof been properly considered, summary judgment could not have been granted. The law of nondisclosure is a powerful tool in the hands of the insurers. It permits the insurers, after a loss, to be both judge and jury of the losses it is asked to pay. It has long been viewed skeptically by authorities as being susceptible to abuse by insurers because once having been raised as a defense to a policy, the assured has the virtually insurmountable task of proving a negative, i.e., that the alleged material fact was not material to the risk. Once an underwriter has stated that the "fact" was material, "... what the assured

can do to counter such evidence is not very clear to me." Anthony Diamond, Q.C., The Law of Marine Insurance - Has it a Future? at 33.

Therefore, the question has always been reserved for the trier of fact because credibility considerations are essential to a determination of materiality.

In deciding such an issue through the procedure of summary judgment, the standard in Adickes was blatantly ignored in that all doubts as to the existence of a genuine issue for trial were resolved against the non-moving party. The trial court, and the court of appeals, weighed the evidence and then proceeded to write new law in violation of Anderson v. Liberty Lobby, made assumptions which invaded the factfinder's province in violation of Matsushita v. Zenith Radio, and ignored the moving party's failure to

respond to adverse materials on which the moving party would bear the burden of proof at trial in violation of Celotex.

IV.

THE COURT OF APPEALS ERRED IN IGNORING THE EXPRESS ISSUE RAISED ON APPEAL THAT THE DISTRICT COURT ERRED IN BASING ITS DECISION ON AN ERRONEOUS FINDING OF FRAUD

The policies of insurance in this case are "valued policies", that is, policies in which the parties have agreed in advance to value. Such valuation is conclusive on the parties and cannot be challenged except on grounds of fraud or mistake.

In an opinion dated March 27, 1986, the district court disclosed that in deciding the case it had, sua sponte, found fraud: "The court found that plaintiff had failed to disclose to defendants a prior cancellation of insurance on the same statuary by another

insurer on grounds of fraud." However, fraud had not been the basis for the cancellation, had not been asserted to the court as a basis for summary judgment, and there were no facts of record to support a finding of fraud.

It is clear that the district court's sua sponte finding of fraud led to an error of law and an erroneous conclusion with respect to the prior cancellation, as well as resulting in bias and lack of impartiality toward the non-moving party. Furthermore, it is well established that while a court of appeals reviews judgments, the language in an opinion can establish that the approach taken by the district court was not supported by the facts. As stated by the court in Lindemann Maschinenfabrik GmbH. v. American Hoist and Derrick Company, 730 F.2d 1452, 1458 (Fed Cir. 1984):

> We review judgments, not the rhetoric in opinions. Nonetheless, the language in an opinion, or a set of findings and conclusions, may indicate that numerous harmful errors of law produced an erroneous conclusion, and that the decisional approach of the district court led to a judgment not supported in law by the facts of record.

Thus, on its face, the district court's sua sponte finding that fraud was the reason for the prior cancellation, the sole basis for summary judgment, was clearly erroneous and led to erroneous conclusions of law regarding materiality by the court. This erroneous finding by the court and its effect on the decision was expressly raised by the assured on appeal and was improperly ignored by the Court of Appeals in reviewing the proceedings in the district court, resulting in manifest injustice.

CONCLUSION

The Court of Appeals' decision has diverged from the proper role of an appellate court in deciding an appeal from summary judgment, that is, to review the admissible evidence of record to determine if the moving party has met its burden of establishing that no genuine issue exists for trial and has improperly written new law in the substantive area of law through the procedural vehicle of summary judgment.

We therefore submit that a writ of certiorari should be granted and that the action be remanded for a trial on the merits.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 55—August Term 1986

Argued: August 27, 1986 Decided: October 22, 1986

Docket No. 86-7294

FREDERICK W.A. KNIGHT,

Plaintiff-Appellant,

—against—

U.S. FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, CENTENNIAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, ROYAL INSURANCE COMPANY OF AMERICA, NORTHWESTERN NATIONAL INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY and CONTINENTAL INSURANCE COMPANY,

Defendants-Appellees.

Before:

FEINBERG, *Chief Judge*, CARDAMONE, *Circuit Judge* and KELLEHER, *District Judge.**

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* Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

Appeal from order of the United States District Court for the Southern District of New York, Constance Baker Motley, Ch. J., granting summary judgment to defendant insurance companies.

Judgment affirmed.

MARY L. MONTGOMERY, New York, NY (Kirlin, Campbell & Keating, James J. Higgins, Donald Burke, Robert A. Milana, of Counsel), *for Plaintiff-Appellant.*

DONALD M. WAESCHE, New York, NY (Waesche, Sheinbaum & O'Regan, P.C., Louis P. Sheinbaum, Richard W. Stone, II, John R. Keough, III, of Counsel), *for Defendants-Appellees.*

FEINBERG, *Chief Judge*:

Frederick W.A. Knight appeals from an order of the United States District Court for the Southern District of New York, Constance Baker Motley, Ch. J., granting summary judgment to defendant insurance companies. Knight argues that summary judgment was inappropriate because several genuine issues of material fact remain unresolved. Upon review, we conclude that no such issues are present. Therefore, we affirm the holding of the district court.

I. Facts

The relevant facts are as follows: Between 1976 and 1979, Knight purchased in Thailand 222 antique stone and bronze statues for approximately $65,000. In 1980, an appraiser hired by Knight valued the collection at $20,205,000. The same appraiser revised his estimate to $27,000,000 in April 1981 and then to $30,307,500 in September 1981, the month in which he died. The appraiser was to receive for his services 5% of the proceeds from the eventual sale of the statues.

Meanwhile, Knight had transported the statuary from Thailand to Singapore. In February 1981, Knight obtained through the insurance brokerage firm of Hogg Robinson & Gardner Mountain (Marine) Ltd. (Hogg Robinson) coverage of $20,205,000 from London underwriters for shipment of the collection from Singapore to Holland. In May 1981, after receiving the first revised estimate from his appraiser, Knight requested and obtained through Hogg Robinson an additional $10,000,000 coverage for the voyage.

In June 1981, however, after the approximately $30 million risk had been placed, Robert Jensen, Knight's broker at Hogg Robinson, received two anonymous phone calls reporting that Knight was planning to perpetrate a fraud. Jensen conveyed this information to the lead London underwriters who, in response, ordered their own appraisal of the statuary. A few days later, Jensen sent a telex to Knight informing him that the underwriters had voided his policy because of his material nondisclosures and misrepresentations regarding his collection. Jensen stated in the telex that, based on their appraiser's inspection of some of the statues, the underwriters be-

lieved that the collection was "grossly over-valued and, in some, if not all cases, replicas. . . . The evidence currently available to underwriters suggests that the proper value of the consignment is nominal only (possibly approximately 1 pct of the value declared)."

In the spring of 1982, Knight again attempted to obtain insurance for the same statues, this time through a New York brokerage firm, H.E. Yerkes & Associates, Inc. Knight obtained $30 million of coverage with several American underwriters for a voyage from Singapore to France. However, the collection ultimately was not shipped and the policy lapsed.

In October 1982, Knight approached Yerkes & Associates to reinstate his $30 million of coverage, claiming that he was preparing to ship the statues to a purchaser in Greece. The brokers succeeded in placing $30,630,750 of risk for the voyage from Singapore to Greece with several American insurance companies. Many of these insurers had agreed to insure the earlier projected voyage from Singapore to France. These are the policies contested in this lawsuit. For convenience, we will refer to them hereafter as one policy (the New York policy).

In January 1983, the statues were loaded on board a vessel for the voyage from Singapore to Greece. On February 7, 1983, the ship sank in the Indian Ocean and the statues were lost.

After the loss of his statues, Knight attempted to collect on the insurance provided by defendant underwriters. Defendants refused and, instead, voided the New York policy *ab initio* because of Knight's alleged material nondisclosures and misrepresentations. Thereafter, Knight brought this lawsuit. Defendants moved for sum-

mary judgment before Judge Motley, and she granted the motion in a 16-page memorandum opinion. This appeal followed.

II. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if it determines that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2509-11 (1986); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985).

Before rendering summary judgment, a court must also determine that any unresolved issues are not material to the outcome of the litigation. "[T]he mere existence of factual issues—where those issues are not material to the claims before the court—will not suffice to defeat a motion for summary judgment." Quarles v. General Motors Corp., 758 F.2d 839, 840 (2d Cir. 1985) (per curiam). Nor may a party rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. Id. Similarly, a "bare assertion that evidence to support a fanciful allegation lies within the exclusive control of the defendants, and can be obtained only through discovery, is not sufficient to defeat a motion for summary judgment." Eastway, 762 F.2d at 251.

Properly used, summary judgment permits a court to streamline the process for terminating frivolous claims and to concentrate its resources on meritorious litigation. Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980). As the Supreme Court recently explained:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.Rule Civ.Proc. 1. . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2555 (1986).

It appears that in this circuit some litigants are reluctant to make full use of the summary judgment process because of their perception that this court is unsympathetic to such motions and frequently reverses grants of summary judgment. Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time, as borne out by a recent study by the Second Circuit Committee on the Pretrial Phase of Civil Litigation, chaired by Professor Maurice Rosenberg. The Committee analyzed the published and unpublished decisions of the Second Circuit for the period from July 1, 1983 to June 30, 1985 and found that

the affirmance rate on appeals from orders granting summary judgment was 79%.[1] Final Report of the Second Circuit Committee on the Pretrial Phase of Civil Litigation 16-17 (June 1986). Thus it is evident that grants of summary judgment are upheld on appeal in most cases. That figure is comparable to this circuit's 84% affirmance rate for appeals in civil cases generally. Id. The widespread misperception regarding the disposition of appeals of summary judgment may be due to the fact that reversals are much more likely to be reported in published opinions than affirmances, which frequently are disposed of by unpublished orders under our Local Rule § 0.23. Id. We hope that the Committee's study dispels the misperception so that litigants will not be deterred from making justifiable motions for summary judgment.

III. Discussion

Judge Motley granted summary judgment for defendants in this case because Knight had failed to inform them of a material fact. After rejecting several alternative grounds for the voidance of the New York policy, Judge Motley ruled that Knight's nondisclosure of the prior London cancellation together with the cancelling underwriters' opinion that the statues were overvalued and inauthentic justified defendant underwriters' voidance of the policy *ab initio*. With respect to this nondisclosure, Judge Motley found that there was no genuine issue as to any material fact. Although Knight presents several challenges to Judge Motley's decision, his arguments center around two main issues: whether the omitted fact was

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[1] Of course, there are few, if any, appeals from orders denying summary judgment, since such orders ordinarily are not appealable.

material and whether the underwriters had knowledge of that fact.

A.

In evaluating whether particular facts are material, we must turn to the substantive law governing marine insurance. It is well-established under the doctrine of *uberrimae fidei* that the parties to a marine insurance policy must accord each other the highest degree of good faith. Puritan Ins. Co. v. Eagle S.S. Co. S.A., 779 F.2d 866, 870 (2d Cir. 1985). This stringent doctrine requires the assured to disclose to the insurer all known circumstances that materially affect the risk being insured. Since the assured is in the best position to know of any circumstances material to the risk, he must reveal those facts to the underwriter, rather than wait for the underwriter to inquire. Id. The standard for disclosure is an objective one, that is, whether a reasonable person in the assured's position would know that the particular fact is material. Btesh v. Royal Ins. Co., 49 F.2d 720, 721 (2d Cir. 1931). To be material, the fact must be "something which would have controlled the underwriter's decision" to accept the risk. Id. The assured's failure to meet this standard entitles the underwriter to void the policy *ab initio*. Puritan Ins. Co., 779 F.2d at 870-71.

Knight contends, however, that an assured's duty to disclose a prior cancellation is not triggered where the cancellation was based on fictitious or false information. He relies on the testimony of Leslie J. Buglass, an expert in marine insurance, that false information cannot materially affect risk. Arguing that his prior cancellation was caused by anonymous phone calls that were entirely

groundless and an inspection that was performed by an unqualified appraiser, Knight maintains that it was error for Judge Motley to dismiss his allegations as irrelevant and to grant summary judgment.

The fact of the prior cancellation and the stated reasons for the cancellation are not disputed. In light of these circumstances, Judge Motley stated:

> [A]s a matter of indisputable fact a prior underwriter's voidance of a thirty million dollar insurance policy on antiquities of dubious origin on the grounds that the goods were "grossly over-valued" and inauthentic would have been material to any subsequent underwriter's decision to accept the risk. . . . No reasonable juror could conclude, under the facts of this case, that defendants would not have declined to embrace plaintiff's requested thirty million dollar policy had they known of the prior London cancellation and of the incriminating contents of the telex from the London broker—at least not without subsequent opportunity for defendants to make their own investigation and perhaps adjust . . . the amount insured.

We see no reason to disturb Judge Motley's conclusion that the fact of the prior cancellation and the stated reasons therefor would have materially affected defendants' decision to provide the thirty million dollar coverage. Although Knight devotes a substantial portion of his briefs to arguing that the prior cancellation was unfounded, that issue does not affect the materiality of the admitted nondisclosure. Regardless of the justifiability of the prior cancellation, the fact remains that the cancellation occurred because the London underwriters

believed that the statues were overvalued and inauthentic. A reasonable assured in Knight's position would know that other insurers providing virtually the same coverage for the same statues would not take on the risk or maintain the same premium without at least investigating the prior cancellation, if informed of it and the stated reasons therefor. Cf. Solez v. Zurich General Accident & Liability Ins. Co., 54 F.2d 523, 526 (2d Cir. 1931), cert. dismissed, 296 U.S. 668 (1932). We hold under these circumstances that the nondisclosure is material. Thus, the materiality of the nondisclosure does not depend on what an investigation would have revealed. The facts of this case illustrate the difficulty courts would face in determining retrospectively what an investigation would have uncovered, when the goods have already been lost. Instead, the insurer should be afforded the opportunity to investigate prior to its acceptance of the risk. Accordingly, the assured is required to communicate the information to the insurer before the policy is issued, so that the insurer can decide for itself at that time whether to accept the risk. This obligation is not burdensome to the assured and it comports with the open disclosure required by the doctrine of *uberrimae fidei.*

Knight's claim that the prior cancellation was unwarranted does not alter this conclusion. We are told that the materiality of information that an assured reasonably believes to be untrue is an issue of first impression, and we will assume for present discussion that Knight's belief in this case is reasonable. Under Knight's view, an assured would be permitted to withhold an otherwise material fact such as cancellation whenever he reasonably believed the basis for the cancellation to be unjustified. Such an approach would unnecessarily complicate litiga-

tion over nondisclosure. Deciding whether the basis for the undisclosed prior cancellation was well-founded would become a mini-trial in itself. The sounder approach is to require an assured to communicate the information to the insurer before a policy is issued, so that the insurer can decide whether to accept the risk despite the prior cancellation. Arnould's Law of Marine Insurance and Average ¶ 653 (M. Mustill & J. Gilman 16th ed. 1981) (hereinafter Arnould's Marine Insurance). Thus courts would not have to divine what would have occurred had there been full disclosure.[2]

We have also considered Knight's argument that a cancellation of prior insurance may be concealed, based on British cases holding that it is not necessary to disclose a prior refusal by another marine insurer to write a policy. See, e.g., Container Transport Int'l, Inc. & Reliance Group, Inc. v. Oceanus Mutual Underwriting Ass'n (Bermuda), 1982 2 Lloyd's L.R. 178, 190. This marine insurance rule is apparently "not followed" in other types of insurance. Arnould's Marine Insurance at ¶ 642 n.75. The rule may be explainable by the unusual nature of marine risks, but seems anomalous in view of the doctrine that the parties to marine insurance must observe the highest degree of good faith. In any event, we are unpersuaded by the analogy. A refusal to write a policy is not the same as a cancellation, particularly when the latter resulted from the insurer's belief that the goods insured were overvalued and inauthentic.

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2 Knight has made a motion to expand the record with an affidavit, not submitted to the district court, concerning the source of the anonymous telephone calls. Since we have determined that the justifiability of the prior cancellation is not relevant to the outcome of this appeal, we deny the motion

Knight also argues that the materiality of a nondisclosure is a factual issue that can be decided only by a jury, because, he urges, live testimony is essential to such a determination. Judge Motley recognized that the materiality of a nondisclosure is a finding of fact that ordinarily is a jury question. In this case, though, since the only possible outcome as a matter of law, even if a trial had been conducted, is in favor of defendants, Judge Motley was correct in granting summary judgment. See R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir. 1984); King v. Aetna Ins. Co., 54 F.2d 253, 255 (2d Cir. 1931). Indeed, it is precisely under these kinds of circumstances that summary judgment serves salutary purposes.

B.

Knight claims that another genuine issue is whether defendants had knowledge, either actual or constructive, of the prior cancellation and the reasons for the cancellation. Such knowledge would defeat defendants' claim that the prior cancellation was not disclosed. Judge Motley's decision does not address this issue. After reviewing the record, we conclude that, even though Knight could have made these legal arguments more clearly in the district court, he did mention these basic contentions in his opposition to summary judgment. Accordingly, we will discuss the merits. Keeping in mind that we are reviewing a summary judgment, we consider the facts in a light most favorable to Knight. See Quinn, 613 F.2d at 442.

Knight argues that he was not required to disclose the prior cancellation to defendants because some of the

underwriters who reinsured a portion of the New York policy were primary insurers of part of the cancelled London policy. But defendants are the primary insurers of the New York policy, not the reinsurers, and there is no indication of actual knowledge of the prior cancellation on their part except for Knight's speculations. Knight's obligation was to communicate material facts to the primary insurers since they issued his policy.

Knight also maintains that two defendants—Insurance Company of North America (INA) and Centennial Insurance Company (Centennial)—had actual knowledge because of their relationship with two underwriters of the London policy—Insurance Company of North America, UK (INA(UK)) and Atlanta Mutual. He alleges that such knowledge existed because INA and INA(UK) are both subsidiaries of the same parent corporation and Centennial is a subsidiary of Atlanta Mutual. Again Knight offers only speculation that the two New York underwriters communicated with the two respective London underwriters about his policy prior to the loss of the statues. Speculation by itself is not enough to defeat a motion for summary judgment. Quarles, 758 F.2d at 840. The other circumstances described by Knight to show actual knowledge are even more speculative and do not require discussion.

Knight's claim of constructive knowledge is based on his alleged disclosure to INA of some of the circumstances surrounding his acquisition of the statues and his prior attempts to obtain insurance. See Luria Brothers & Co. v. Alliance Assurance Co., 780 F.2d 1082, 1091 (2d Cir. 1986). He argues that the other defendants regarded INA as the lead underwriter and that they learned of any information known to the leader. Knight disclosed infor-

mation such as the "very moderate" purchase price, the illegal export of the statues out of Thailand, his desire to avoid the London insurance market, and an earlier attempt to obtain "$15,000,000 upwards" coverage for the collection. None of this information, however, relates to the cancelled London policy. In view of the high burden of disclosure on the assured in the field of marine insurance, we conclude that this information falls short of providing sufficient notice so as to shift the obligation to defendants to inquire about a prior cancellation. Closely related to the claim of constructive knowledge is Knight's argument that defendants have not fulfilled their own obligations under *uberrimae fidei*. See Puritan Ins. Co., 779 F.2d at 870. He contends that they would have made inquiries and learned of the prior cancellation if they had been acting in the utmost good faith. Since the speculative assertions on which Knight relies do not establish a genuine issue with respect to any of these issues, these claims must fail.

IV. Conclusion

We conclude that Judge Motley's grant of summary judgment was appropriate since Knight has not shown any genuine issue as to a material fact. The justifiability of the prior cancellation is not a material fact and defendants' knowledge of the prior cancellation is not a genuine issue. Therefore, we affirm Judge Motley's decision to grant summary judgment and to dismiss the case.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

FREDERICK W.A. KNIGHT, :

Plaintiff :

-against- :

U.S. FIRE INSURANCE COMPANY, :
INSURANCE COMPANY OF NORTH
AMERICA, CENTENNIAL INSURANCE :
COMPANY, RELIANCE INSURANCE
COMPANY, FEDERAL INSURANCE :
COMPANY, ROYAL INSURANCE COMPANY,
OF AMERICA, NORTHWESTERN NATIONAL :
INSURANCE COMPANY, HIGHLANDS
INSURANCE COMPANY and CONTINENTAL :
INSURANCE COMPANY.

----------X

83 Civ. 5102 (CBM)

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MOTLEY, Ch. J.

OPINION

In late 1982 plaintiff Frederick Knight obtained a policy of insurance worth over thirty million dollars for a collection of Thai statuary which he was planning to ship from Singapore to Piraeus, Greece. After the vessel sank in transit, plaintiff attempted to collect on the insurance but was refused by defendants herein, the policy's underwriters. Defendants claim they were entitled to void the insurance ab initio, and have done so, because of plaintiff's alleged material nondisclosures and misrepresentations. Plaintiff, accordingly, comenced this law suit.

Defendants have now moved for summary judgment on the grounds that no material fact exists as to their right to have cancelled plaintiff's policy and that, therefore, plaintiff may not collect under it. For the reasons that follow, defendants' motion is granted and this case dismissed.

FACTS

Plaintiff is a citizen of Holland who had moved to Bangkok, Thailand in the 1970's and who continues to reside there. Between 1976 and 1979 plaintiff obtained 222 antique stone and bronze statutes of Buddhas and fable gods for an aggregate price of approximately $65,000. In 1980 an appraiser in Bangkok, hired by plaintiff, placed a value of $20,205,000 on the statuary. The next year, in April 1981, this same appraiser revised his estimate for the collection to $27,000,000, and then later that year, in the beginning of September, to $30,307,500. Meanwhile at some time between 1980 and summer 1981, the 222 pieces of sculpture were shipped in various lots from Bangkok to Singapore.

Claiming that he was planning to sell the Buddhas and fable gods to a European

collector, in February 1981 plaintiff contacted the London brokerage firm of Hogg Robinson to arrange for insurance. He requested coverage of $20,205,000 to insure the collection during a sea shipment from Singapore to The Netherlands. The insurance was successfully placed on the London market. In May of 1981, pursuant to the increased valuation of his Bangkok appraiser, plaintiff requested and obtained through Hogg Robinson an additional $10,000,000 coverage for the voyage.

All did not proceed smoothly, however. In June of 1981, Mr. Robert Jensen, plaintiff's broker at Hogg Robinson, received two anonymous phone messages from callers who said they had a score to settle with plaintiff. Knight, they informed the broker, was about to perpetrate a fraud with his shipment of Buddhas and fable gods. Jensen conveyed this information to the lead London

underwriters of plaintiff's policy who, in turn, expeditiously ordered an independent appraisal of the statues which were still awaiting shipment in Singapore. A few days later, plaintiff received a telex from Jensen in London. It informed him that the London underwriters had voided his policy, having concluded that plaintiff was guilty of material mon-disclosures and misrepresentations in his insurance application. The telex from Jensem further relayed to plaintiff the underwriters' opinion that the statues were "grossly over-valued," "and in some, if not all cases, replicas," the evidence having suggested that the "proper value of the consignment [was] nominal only (possibly approximately 1 pct of the value declared)."

About a year passed before any additional events relevant to this law suit occurred. In spring of 1982, plaintiff made a completely new attempt to obtain insurance for

his shipment of Buddhas and fable gods from Asia to Europe. This time he approached a New York brokerage firm, H.E. Yerkes & Associates ["Yerkes & Associates"] which successfully placed the over thirty million dollar risk with several American insurance companies, the defendants in the present suit. This first New York policy was for a voyage from Singapore to Marseilles, and thence to Paris, where a prospective buyer for the collection, allegedly interested in it to the tune of thirty million dollars, wished it sent. When the collection was not shipped from Singapore within the time period of coverage, this first New York policy was cancelled.

Plaintiff received a letter at this time from a Mr. Howland Keller, a vice president of Yerkes & Associates, detailing the background of his initial cancellation resulting from the delay in shipment date. In this May

1982 letter Keller also reiterated the "underwriting position" of one of the main underwriters, INA [Insurance Company of North America]. "Please understand," Keller wrote,

> "that the risk as originally presented to INA was that of a sold shipment, i.e., a completed sale, conditional only upon the buyer's approval when it arrived in Paris. The value was established by an appraisal and by a letter from the buyer (we have copies of both)." (emphasis added).

The appraisal referred to was that of plaintiff's expert in Bangkok. The "letter from the buyer," a certain Egyptian living in Alexandria, stated that he was interested in purchasing the entire collection for a sum not exceeding thirty million dollars.

A few months later, in October of 1982, plaintiff made a second application to his New York broker for voyage insurance to cover the 222 Buddhas and fable gods. By a telex dated October 17, plaintiff informed Yerkes & Associates that he had found a wealthy Greek

shipowner by the name of George Papalios who was interested in the collection and was prepared to negotiate for its purchase at a price of around thirty million dollars. Accordingly, plaintiff wished to reinstate insurance for a voyage from Singapore to Europe, but this time with a Piraeus, Greece destination.

Plaintiff's telex also represented that storage and guards at a bonded warehouse in Piraeus had been arranged, and that $30,000,000 in fire and theft insurance for the port to warehouse transit in Greece had been obtained. Furthermore, continued the telex message, as to the voyage itself, plaintiff's agent in Greece was arranging for the hire of a first class vessel from Singapore to Piraeus with a captain who would be willing to supervise loading and stowage of the antiques.

Shortly thereafter, Yerkes & Associates successfully placed a new risk of $30,630,750 for this projected voyage with the defendant insurance companies. This group was substantially the same as that which had insured the projected Singapore to Marseilles voyage earlier in the year. Although these underwriters were apprised of plaintiff's October 17 telex detailing the proposed voyage to Greece, none was informed that the London insurance market had previously voided a policy with plaintiff for shipment of the same 222 Buddhas and fable gods for the reasons stated above. Moreover, with the possible exception of INA, one of the main underwriters, none of these American underwriters had been appraised of plaintiff's approximtely $65,000 initial purchase price for the collection or of the fact that under Thai Law antiquities of such value could only have been smuggled illegaly from that country.

Finally, in January 1983, a container said to contain plaintiff's collection of 222 bronze and stone Buddhas and fable gods was loaded on board the ALIAKMON RUNNER at the port of Singapore for carriage to Piraeus, Greece. The ship set sail from Singapore roughly as scheduled. However, on or about February 7, 1983, the ALIAKMON RUNNER sank deep in the Indian Ocean.

DISCUSSION

Defendants claim that summary judgment based on their asserted right to void plaintiff's insurance policy should be granted on the basis of plaintiff's alleged material non-disclosures and misrepresentations as enumerated below. At the outset, it must be noted that under established principles of maritime law, see infra, any one of these alleged nondisclosures or misrepresentations, if in fact they occurred and were material,

clearly would have justified defendants in voiding plaintiff's thirty million dollar policy on the Buddhas and fable gods.

The material non-disclosures charged by defendants are as follows:
(1) the low price plaintiff originally paid for the statuary in the jungles of Thailand, approximately $65,000 only a few years earlier; (2) the fact that, if the multi-million dollar value that plaintiff had represented was accurate, the objects' previous exportation from Thailand would have been illegal; and (3) the fact that earlier, in 1981, London underwriters had cancelled a similar insurance policy on the same 222 Buddhas and fable gods, notifying plaintiff that according to their independent appraisals the objects were grossly overvalued and appeared to be replicas rather than genuine specimens.

Defendants also charge that plaintiff made actual material misrepresentations

regarding the insured goods. These alleged misrepresentations are all contained in the October 17, 1982 telex sent by plaintiff to his broker in New York and consist of the following statements by plaintiff: (1) that there was an interested buyer in Greece whose whose price for the art objects would be in the area of thirty million dollars; (2) that bonded storage in Piraeus had been arranged; (3) that fire and theft insurance had been arranged; and (4) that plaintiff's agent in Greece was actively making arrangements for shipment of the objects from Singapore to Greece on a first class vessel.

The Standard for Summary Judgment

The standard for granting a summary judgment motion unde Fed.R.Civ.P. 56(c) is a difficult one to satisfy. Summary judgment may be granted only if there exists no genuine issue as to any material fact in the case

and if upon such indisputable facts, the moving party is entitled to judgment as a matter of law. See Battery Steamship Corp. v. Refineria Panama, S.A., 1975 AMC 842, 845, 513 F.2d 735, 738 (2d Cir. 1975). Even where the parties are in accord as to the actuality of the relevant circumstances, a dispute of material fact so as to preclude summary judgment may exist if divergent and legally significant inferences can be drawn from these agreed upon factual circumstances. This is because such an inferential function belongs to the trier of fact alone. See Katz v. Goodyear Tire and Rubber Co., 737 F.2d 238 (2nd Cir. 1984).

It is obvious from the documents submitted thus far in this action, and even without fully considering the applicable law, that there is a disputed issue of material fact with regard to at least two of plaintiff's alleged misrepresentations. First, as

to plaintiff's telexed statement that it had located an interested party in Greece in the thirty million dollar price range, plaintiff in his depositions concedes that this information was erroneous. However, plaintiff asserts, when he subsequently discovered that the buyer was interested only in the amount of three million dollars, he quickly informed his American agent by telephone. This agent in turn, and again by phone, quickly reported back to plaintiff in Singapore that INA, one of the main underwriters, had been apprised of this correction as to the Greek's purchase price and had given assurances that this change was immaterial to them.

Plaintiff's account surely has something of an incredible air about it. Nonetheless, whether the telexed information regarding a Greek buyer constituted a misrepresentation justifying avoidance of the policy, or whether instead it was a clerical error,

subsequently corrected and communicated, remains a disputed issue of fact not properly determined in a summary judgment motion. Similarly, and even more clearly a matter of factual dispute in this case is the misrepresentational status of plaintiff's telexed assertion regarding the vigor of his Greek agent's efforts to arrange for a first class vessel for the passage from Singapore to Piraeus.

The other nondisclosures and misrepresentations by plaintiff that defendants argue justified their avoidance ab initio of plaintiff's policy, are essentially uncontested by both parties and are not quite so simply dismissed. As to these--plaintiff's misrepresentations regarding his preparations for bonded storage and fire and theft insurance in Greece, as well as plaintiff's nondisclosure of information regarding the statutary's initial purchase price, the

circumstances of its export from Thailand, and the fact that a similar policy had been voided by London underwriters--a closer look at the law of maritime insurance is required to determine whether any factual dispute yet lingers.

The doctrine of uberrimae fidei

Under traditional and still vital principles of admiralty law, it is "well established that the parties to a marine insurance contract are held to the highest degree of good faith." Puritan Insurance Co. v. Eagle Steamship Co., 1986 AMC 1240 at 1244, 779 F.2d 866 at 870, (2d Cir. 1985). This obligation, which goes by the name of uberrimae fidei, requires the party seeking insurance to disclose all circumstances known to him which materially affect the risk. Id. See also Btesh v. Royal Ins. Co., Ltd. of Liverpool, 1931 AMC 1044, 1046, 49 F.2d 720,

721 (2d Cir. 1931) (L. Hand, J.). This high standard requires, moreover, that the assured communicate all material information regardless of whether any inquiry was made concerning it. Gulfstream Cargo, Ltd. v. Reliance Insurance Co., 1969 AMC 781, 790, 409 F.2d 974, 980-81 (5th Cir. 1969); Contractors Realty v. Ins. Co. of North America, 1979 AMC 1864 1875, 469 F.Supp. 1287, 1294 (SDNY 1979). Departure on the part of the assured from the stringent disclosure obligations of this uberrimae fidei doctrine entitles the insurer to cancel the policy ab initio. See Puritan Insurance Co. v. Eagle Steamship Co., 1986 AMC at 1245-47, 779 F.2d at 870-71 (2d Cir. 1985).

The question of whether a non-disclosure or a misrepresentation is material, however, so as to entitle an underwriter to void the policy is a matter of fact. Materiality in this context depends on whether the

information is "something which would have controlled the underwriter's decision" to take on the risk. Puritan Insurance Co. v. Eagle Steamship Co., supra, 1986 AMC at 1245, 779 F.2d at 871, quoting Btesh v. Royal Ins. Co., 1931 AMC 1044, 1046, 49 F.2d 720, 721 (2d Cir. 1931). See also Btesh v. Royal Ins. Co., supra, 1931 AMC at 1046, 49 F.2d at 721 (elaborating that "something which would have controlled the underwriter's decision," must be understood as an objective standard, i.e., to mean "material" for a reasonable person in the assured's position). It is the problematic answer to this factual question--the question as to the materiality as thus defined of plaintiff's remaining and conceded misrepresentations and non-disclosures--that this court concludes removes all but one of these misrepresentations and non-disclosures as an available ground for summary judgment in favor of defendants on this motion.

First of all, the materiality to defendants of plaintiff's initial purchase price for the 222 Buddhas of fable gods seems at least questionable. True, there is a remarkable discrepancy between the $65,000 said to have been paid for the entire collection and its ultimate appraisal. It must be remembered, however, that the statues were allegedly bought in a war-torn, third world country--a context where bonanzas (to use the kindest term) in the purchase of antiquities and national treasures are not beyond the realm of probability. Moreover, it seems at least conceivable that the phenomenon of vast fluctuation and speculation in the contemporary art market would also render the relatively low initial purchase price a fact of not much consequence to the subsequent insurers. Clearly, on this issue, much remains to be weighed by the trier of fact.

Secondly, the materiality of the historical fact that plaintiff may have illegally smuggled the antiquities from Thailand to Singapore seems even more dubious. Defendants were insuring the goods on a voyage from Singapore to Greece and there is little indication even in their own depositions that prior violations of Thai export regulations would affect the risk of such a voyage.

At this point it is relevant to comment on the statements made by defendants' representatives during the course of proceedings in this case to the effect that plaintiff's initial purchase price and a history of smuggling would have been material to the decision to grant plaintiff an insurance policy. For purposes of a summary judgment motion these assertions are of little interest. Defendants' own post facto assertions of materiality, especially in this context where their self-serving nature should be obvious

(defendants have thirty million dollars to lose if plaintiff's policy remains in effect) are clearly subject to credibility determinations by the trier of fact. See Puritan Insurance Co. v. Eagle Steamship Co., 1986 AMC at 1247, 779 F.2d at 872 (2d Cir. 1985).

The two conceded misrepresentations in plaintiff's October 1982 telex--those regarding his bonded storage arrangements and his fire and theft insurance arrangements in Piraeus - involve similarly crucial and factually unresolved questions of materiality. It simply cannot be said, from the evidence thus far presented or as a matter of law, that these two facts would have controlled defendants' decision to take on Knight's thirty million dollar risk. Thus, they too furnish defendants with no basis for success in their summary judgment motion.

Ample grounds for this court to grant summary judgment in defendants' favor exist,

however, in the remaining conceded non-disclosure. There can be no question that the voidance a few months earlier of plaintiff's prior London insurance policy for approximately thirty million dollars on the same collection of Buddhas and fable gods would have been a material, i.e., controlling, factor in defendants' decision to accept the risk. Just as indisputable, it would have been material and controlling to any reasonable person in the underwriters' position.

Plaintiff has argued that the London underwriters were unjustified in their cancellation of the earlier 1981 policy and thus there was no need to disclose this prior voidance to subsequent insurers. It was unjustified, explains plaintiff, because it was rooted in two anonymous telephone calls impugning plaintiff's integrity and also because the independent appraisal relied upon

by these London underwriters had been done by an allegedly unqualified appraiser. These allegations are irrevelant. The undisputed fact remains that in July 1981 plaintiff received a telex in Singapore from his London broker informing him that the underwriters had cancelled their coverage. The telex explicitly informed him of the reasons offered by the underwriters in coming to this decision, i.e., their determination upon independent inspection that the statuary was "grossly overvalued" and consisted largely of "replicas."

It seems obvious to this court that, as a matter of indisputable fact, a prior underwriter's voidance of a thirty million dollar insurance policy on antiquities of dubious origin on the grounds that the goods were "grossly over-valued" and inauthentic would have been material to any subsequent underwriter's decision to accept the risk. See

King v. Aetna Ins. Co., 1931 AMC 1940, 1941-42, 54 F.2d 253, 254 (2d Cir. 1931) (Swan, J.) (while ordinarily the materiality of nondisclosure in a marine insurance context is a fact for the jury, in a case where the evidence of objective materiality is overwhelming, e.g., valuation of a vessel at sixteen times its purchase price, a trial court may determine on a pre-trial motion that the policy has been voided justifiably). No reasonable juror could conclude, under the facts of this case, that defendants would not have declined to embrace plaintiff's requested thirty million dollar policy had they known of the prior London cancellation and of the incriminating contents of the telex from the London broker -- at least not without subsequent opportunity for defendants to make their own investigation and perhaps to adjust the amount insured.

It is not necessary, though, to resort to common sense for a determination that plaintiff's non-disclosure of the London underwriters' decision was indisputably material. Independent written statements by plaintiff's New York broker prior to defendants' entry into this second Singapore to Piraeus underwriting venture make the materialty of the London telex quite clear. The July 9, 1982 letter to plaintiff from Howland Keller on behalf of Yerkes & Associates sets forth the "underwriting position" of the New York underwriters. Keller focussed on the certrality in the prior Singapore to Marseilles insurance undertaking of the fact that there had been a writing signed by a prospective buyer indicating a thirty million dollar value for plaintiff's collection. This "underwriting position" letter from Keller places it beyond dispute that independent information pertaining to the appraised

value of plaintiff's Thai sculpture would be absolutely essential to any decision by the New York underwriters to enter into a second insurance policy for a shipment from Singapore to Greece. A statement by major London insurance companies challenging plaintiff's own appraisal of the Buddhas and fable gods as inflated by possibly one hundred times their true value falls clearly into this category of material information.

Accordingly, faced with the undisputed fact that plaintiff failed to disclose, although he knew of, the London underwriters' cancellation and their stated reasons therefor, and the fact that no reasonable trier of fact could find that this information would not have been material to defendants' decision to take on the risk, this court determines that no genuine issue of material fact remains as to this non-disclosure to preclude a grant of summary judgment. As a matter of

law, defendants were within their rights in voiding ab initio the insurance policy in question here because plaintiff failed to disclose to them a material fact. Thus, because defendants must prevail against plaintiff in his attempt to collect under the insurance policy, defendants' motion for summary judgment is granted and the case dismissed.

Dated: New York, New York
February 10, 1986

S/
Constance Baker Motley
Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

FREDERICK W.A. KNIGHT, :

Plaintiff, :

- against- :

U.S. FIRE INSURANCE COMPANY, :
INSURANCE COMPANY OF NORTH AMERICA,
CENTENNIAL INSURANCE COMPANY, :
RELIANCE INSURANCE COMPANY,
FEDERAL INSURANCE COMPANY, :
ROYAL INSURANCE COMPANY OF AMERICA
NORTHWESTERN NATIONAL INSURANCE :
COMPANY, HIGHLANDS INSURANCE COMPANY
and CONTINENTAL INSURANCE COMPANY :

Defendants. :

----------X

83 Civ. 5102 (CBM)

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MOTLEY, CH. J.

OPINION

Plaintiff has moved under Local Rule 3(j) for reargument of this court's opinion and order entered February 25, 1986 granting defendants summary judgment and dismissing this case. Plaintiff had sued defendant insurers for reimbursement on a shipment of Thai statuary from the Far East to Europe that was irretrievably lost when the vessel sank in transit in the Indian Ocean. The insurers had refused to pay plaintiff's claim under the policy and had voided the policy ab initio on the grounds that plaintiff had failed to disclose to them certain material facts reflecting on the shipment's value. The court granted defendant insurers' summary judgment motion based on the insurers' defense that they were entitled to void

plaintiff's policy ab initio. The court found that plaintiff had failed to disclose to defendants a prior cancellation of insurance on the same statuary by another insurer on grounds of fraud.

In its motion to reargue, plaintiff relies on a recent Second Circuit opinion, never brought to the court's attention, which was issued several weeks prior to this court's opinion and order granting defendant summary judgment. Luria Brothers & Co., Inc. v. Alliance Assurance Co., Docket Nos. 85-7002, 85-7004, 85-7028, decided January 19, 1986, petition for rehearing denied February 14, 1986. In Luria the defendant insurers had failed to raise their non-disclosure defense to plaintiff's insurance policy until seven years after declining

liability under it. The original refusal of liability had been based on an entirely different ground. The Luria court held that where an insurer originally refused to pay based on a specific defense, unless the insurer had no knowledge of the facts giving rise to a new and additional defense, he is bound by the original defense and all other grounds for avoiding liability are waived. Id. 7060-7062.

Plaintiff's motion to reargue in the instant case was made on March 21, 1986, after plaintiff had obtained new counsel with whom to pursue its appeal. Because, for the reasons that follow, it is clear as a matter of law that plaintiff's motion is untimely and that this court is without power to entertain it, the dubious merits of plaintiff's

reliance on Luria will not be reached, and plaintiff's motion is denied.

Plaintiff's self-styled Local Rule 3(j) motion to reargue must in fact be seen as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). See Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 41 (2d Cir. 1982)(notwithstanding movant's reliance on Fed. R. Civ. P. 60, where post-judgment motion calls into question and the correctness of that judgment, such motion should be treated as a motion under Rule 59(e)); Stephenson v. Calpine Conifers II, Ltd., 652 F.2d 808, 811 (9th cir. 1981)(Rule 59(e) motion is the proper vehicle for seeking reconsiderations of dispositive trial court determinations on motions for dismissal or for summary judgment).

Under Fed. R. Civ. P. 59(e), a party has only ten days from entry of judgment in which to file its motion to alter or amend a judgment. It is well-established that this time limit is jurisdictional and mandatory; the court is without power to enlarge the time for filing such a motion. Textile Banking Co., Inc. v. Rentschler, 657 F.2d 844, 849 (7th cir. 1981); Spurgeon v. Delta Steamship Lines, Inc., 387 F.2d 358, 359 (2d Cir. 1967); Gilroy v. Erie-Lackawanna R. Co., 44 F.R.D. 3 (S.D.N.Y. 1968). See also Fed. R. Civ. P. 6(b) (the court "may not extend the time for taking any action under rules ... 59(b), (d) and (e) ... .").

Because there can be no dispute that plaintiff's rule 59(e) motion filed on March 21, 1986 was filed more than ten days

after the entry of this court's judgment on February 25, 1986, the motion is untimely.

Accordingly, plaintiff's motion for reargument is denied.

Dated: New York, New York
March 27, 1986

S/

CONSTANCE BAKER MOTLEY
Chief Judge

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of October one thousand nine hundred and eighty-six.

Present:

HON. WILFRED FEINBERG, Chief Judge,
HON. RICHARD J. CARDAMONE, Circuit Judges,
HON. ROBERT J. KELLEHER, District Judge.*

----------X

FREDERICK W.A. KNIGHT, :

Plaintiff-Appellant, :

- against - :

U.S. FIRE INSURNCE COMPANY, :
INSURANCE COMPANY OF NORTH AMERICA,
CENTENNIAL INSURANCE COMPANY, :
RELIANCE INSURANCE COMPANY, FEDERAL
INSURANCE COMPANY, ROYAL INSURANCE :
COMPANY OF AMERICA, NORTHWESTERN
NATIONAL INSURANCE COMPANY, :
HIGHLANDS INSURANCE COMPANY and
CONTINENTAL INSURANCE COMPANY, :

Defendants-Appellees. :

----------X

Docket No. 86-7294

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH,
Clerk
S/

By: Edward J. Gua. .ro,
Deputy Clerk

* Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

Rule 56. Summary Judgment

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may

served opposing affidavits. The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good

faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidenve, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof refered to in an affidavit shall be attached thereto or served therewith. The court may permit affidavit to be

supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may offer a continuance to permit affidavits to be obtained or depositions to be taken or

discovery to be head or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Supreme Court, U.S.
FILED
FEB 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1214

IN THE

Supreme Court of the United States

October Term 1986

FREDERICK W.A. KNIGHT,

Petitioner,

—against—

U.S. FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, CENTENNIAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, ROYAL INSURANCE COMPANY OF AMERICA, NORTHWESTERN NATIONAL INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, and CONTINENTAL INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 19, 1987

Counterstatement of Questions Presented

(1) Should the centuries' old doctrine that a marine insurance contract is *uberrima fides,* i.e. one conceived in the utmost good faith and incubated in a legal environment which transcends the sharper practices of the world of commerce, be abrogated?

(2) Did the United States District Court for the Southern District of New York and the Court of Appeals for the Second Circuit properly apply standards for granting summary judgment?

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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

No. 86-1214

FREDERICK W.A. KNIGHT,

Petitioner,

—against—

U.S. FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, CENTENNIAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, ROYAL INSURANCE COMPANY OF AMERICA, NORTHWESTERN NATIONAL INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, and CONTINENTAL INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Introduction

Petitioner asserts that its petition should be granted:

(1) to permit this Court to review and nullify the rule of law that the doctrine of *uberrima fides* is applicable to contracts of marine insurance; and

(2) to determine whether the United States District Court for the Southern District of New York properly granted respondents' motion for summary judgment, and the Court of Appeals for the Second Circuit properly affirmed the decision of the District Court.

There is no special or important reason for the granting of a writ in this case under Rule 17 of the Supreme Court Rules.

Counterstatement of the Case

This suit was the subject of extensive pretrial discovery, including the taking of at least sixty-six depositions in Singapore, Piraeus, London and New York. When the motion for summary judgment was made, the following facts were undisputed and are indeed indisputable:

Between 1976 and 1979, when the petitioner admittedly was not an expert in Thai and Khmer antiquities, he purchased 222 statutes of stone and bronze buddhas and fabl:gods in Thailand for an amount between U.S. $60,000 and $65,000.

In December 1979 or early January 1980, he brought all of the 222 statues to the home of Veera Tangthanasaith (Veera), an antique dealer in Bangkok, who was his personal friend. On January 24, 1980, Veera issued a valuation report which appraised the statues for $22,205,000.

On April 7, 1980, Veera applied to the Director General of the Fire Arts Department of the Kingdom of Thailand for an export permit which would enable him to legally export 18 statues from Thailand. The statues were inspected by a committee of three assistant curators of the National Museum of Thailand; were found by the committee to be replicas; and an export permit was granted bearing the number 804/2523. Some of the 18 statues formed a part of the 222 statues which were eventually insured by the respondents for a voyage from Singapore to Piraeus.

Between March of 1980 and June of 1981, petitioner had his 222 statues shipped in various lots from Bangkok to Singapore. They were then stored in crates in a Singapore warehouse or godown. By the time the last shipment arrived, the interior of the godown was filled with crates. The remaining crates were left on the sidewalk in front of the building.

While the statues were being shipped to Singapore, and while the statues were in the godown in Singapore, they were uninsured.

In February of 1981, petitioner requested the London insurance brokerage firm of Hogg Robinson to obtain insurance covering the 222 statues for a voyage from Singapore to Holland in the amount of $20 million, claiming that he was going to sell them to an Arab purchaser. The insurance was placed in the London market as requested.

On May 1, 1981, petitioner requested Hogg Robinson to obtain additional insurance raising the coverage to more than $30 million for the same voyage. An additional $10 million was obtained by Hogg Robinson in the London market.

Some four months later, on September 5, 1981, Veera issued a second appraisal which upped the value of the 222 statues to $30,307,500. Veera was to receive for his services as an appraiser, 5% of the amount petitioner would receive from the sale of the objects. Veera died that same month.

Petitioner made arrangements with a freight forwarder named Damco to have his 222 statues shipped from Singapore to Holland on board the ScanDutch vessel NEDLLOYD HOORN.

The vessel was in liner service between the Far East and Europe, and was scheduled to depart Singapore on July 28, 1981.

In June 1981, Robert Jensen, petitioner's broker at Hogg Robinson, received two anonymous telephone calls. The callers knew that Jensen was petitioner's broker, and that Jensen had placed insurance covering the buddhas and fablegods for a voyage from Singapore to Holland. Jensen was informed that petitioner was about to perpetrate a fraud. Jensen informed the lead underwriters. London underwriters demanded that a portion of the statues be inspected by an appraiser of their

choice before being loaded on board the NEDLLOYD HOORN. An appraisal was conducted of 9 of the 222 statues. The appraiser, Lau, reported that the 9 which he saw were fake and highly overvalued. Specifically, Lau found that one of the bronze statues had nails in its core; one of the stone statues had been dyed to make it appear antique; and on others the edges of the carvings were rough as if newly carved, rather than smooth as they would have been if carved sometime between the 5th and 12th century.

Photographs were taken of the statues Lau examined. On some of the statues tags were affixed. They were tags bearing the number 804/2523, i.e. the number of the export permit granted by the Fine Arts Department of the Kingdom of Thailand for the 18 statues they had examined for Veera and found to be replicas. At least five of the statues examined by Lau formed a part of the 18 statues previously examined by the National Museum, a Division of the Fine Arts Department of the Kingdom of Thailand.

Upon receiving the Lau report, London underwriters voided the policy *ab initio*. Jensen sent the following telex to petitioner on July 24, 1981:

> "FOR THE URGENT ATTENTION OF MR. F. KNIGHT ROOM 3107
>
> DESPITE ALL OUR EFFORTS REGARDING YOUR SHIPMENT UNDERWRITERS HAVE TENDERED NOTICE TO CANCEL AND HAVE WRITTEN TO HOGG ROBINSON FORMALLY USING THE FOLLOWING WORDING
>
> QUOTE
>
> BEING MINDFUL OF THE FACT THAT IT HAD BECOME UNDERWRITERS INTENTION TO HAVE THE ENTIRE CARGO INSPECTED AND VERIFIED PRIOR TO LOADING, THE FOLLOWING SITUATION HAS ARISEN. THE STATUES WHICH UNDERWRITERS REPRESENTATIVES HAVE BEEN PERMITTED TO INSPECT

ARE CONSIDERED BY UNDERWRITERS REPRESENTATIVE TO BE GROSSLY OVER-VALUED AND, IN SOME, IF NOT ALL CASES, REPLICAS. THE ONLY CONCLUSION THEREFORE THAT UNDERWRITERS CAN REACH IS THAT THE CARGO IS MATERIALLY DIFFERENT AS TO CONTENT AND VALUE THAN WAS REPRESENTED TO THEM AT THE TIME OF MAKING THE INSURANCE CONTRACT. THIS CONCLUSION IS SUPPORTED BY THE RESULT OF INFORMAL ENQUIRIES MADE FOR UNDERWRITERS IN LONDON AT SHORT NOTICE. IT IS UNDERWRITERS CONCLUSION THAT THE POSITION HAS BEEN MATERIALLY MISREPRESENTED AND/OR THERE HAVE BEEN MATERIAL NON-DISCLOSURES TO UNDERWRITERS, AND AS A CONSEQUENT [sic] OF WHICH THEY ARE ENTITLED TO AVOID AND DO HEREBY AVOID THE INSURANCE CONTRACT AND OFFER TO RETURN THE PREMIUM. THE EVIDENCE CURRENTLY AVAILABLE TO UNDERWRITERS SUGGESTS THAT THE PROPER VALUE OF THE CONSIGNMENT IS NOMINAL ONLY (POSSIBLY APPROXIMATELY 1 PCT OF THE VALUE DECLARED). WHILST THEY HEREBY AVOID THE POLICY AND PROFFER A RETURN OF PREMIUM UNDERWRITERS ARE NEVERTHELESS PREPARED TO RECONSIDER THE RISK AT A PROPER VALUE TO BE AGREED

UNQUOTE"

London underwriters agreed to reconsider the risk on the condition that an expert of their choice examine all of the 222 statues. This information was conveyed to the petitioner. Instead of accepting the offer, petitioner wrote to Jensen requesting that the London insurance be canceled.

Petitioner then decided that he would have his 222 buddhas and fablegods shipped to Marseilles, where supposedly they would be purchased by the same Arab buyer. He again went to the freight forwarder, Damco, who arranged for shipment from Singapore to Marseilles on the ScanDutch vessel TOYAMA, which was also on regularly scheduled liner service.

Petitioner approached a friend in New York by the name of O'Leary who was a reinsurance broker. He in turn communicated with the brokerage firm of H.E. Yerkes & Associates and requested Yerkes to obtain insurance in the U.S. covering the 222 statues for $30 million for a voyage from Singapore to Marseilles, and thence to Paris. Neither the petitioner nor O'Leary ever told anyone at Yerkes that London underwriters had voided a prior policy on the grounds of misrepresentation and nondisclosure in that the statues were fake and highly overvalued. Rather, Yerkes' office was informed that the London market was willing to undertake the risk, but the limit of coverage which could be obtained was $20,000,000. No one at Yerkes' office was advised that the statues had been purchased by petitioner for the aggregate amount of $60,000 to $65,000. Yerkes' people were given approximately 28 photographs of buddha images, and were led to believe that the photographs depicted a portion of the 222 statues which underwriters were asked to insure. In fact, none of the photographs depicted any of the 222 statues which petitioner intended to ship from Singapore to Marseilles. Yerkes' office was informed that petitioner was a well-known art collector who enjoyed an international reputation. Yet petitioner by his own admission was not at this time an expert on Thai and Khmer art. Yerkes was given the valuation report received from Veera in the amount of $30 million. Yerkes was given a letter which stated, in effect, that Arab buyers would purchase the statues on arrival in Paris, following inspection, for $30 million.

Respondent Insurance Company of North America (INA) agreed to issue a certificate covering the 222 statues for a voyage from Singapore to Marseilles, then to Paris, for $30,307,500, and then reinsured the risk, retaining for itself $6 million in coverage.

Prior to the departure of the TOYAMA from Singapore, petitioner's freight forwarder, Damco, advised petitioner that the French customs authorities would require detailed invoices

showing the nature of the goods and their value. Petitioner was further advised by Damco that the French customs authorities required a deposit amounting to 10% of their true value in order to permit the goods to be imported into that country. Petitioner thereupon made up his own valuation report which listed the 222 statues, and appraised them at 1 million french francs, i.e. $235,294.12. Petitioner gave that document to Damco but he does not know whether Damco gave it to the French customs authorities. In any event, the buddhas and fablegods did not leave Singapore for Marseilles. When the collection was not shipped from Singapore within the time period of the coverage, INA canceled the policy.

On July 9, 1982, Keller of Yerkes' office sent a letter to petitioner advising him of the cancellation. The letter states in part:

> "Please understand that the risk, as originally presented to INA, was that of a sold shipment, i.e. a completed sale, conditioned only upon the buyers approval when it arrived in Paris. The value was established by an appraisal and by a letter from the buyer (we have copies of both)."

On October 17, 1982, petitioner, with the help of his friend O'Leary, composed and sent the following telex to Yerkes' office:

> "re shipment of buddhas and fablegods
>
> with reference your letters may 17th and july 9th 1982 re the above i would like to inform that a wealthy Athens shipowner mr. George Papalios has expressed considerable interest in my collection and is prepared subject to inspection of all pieces upon arrival in Athens to negotiate in the us dollrs. 30.000.000 area in respect of the purchase of my collection. i therefore request you to approach underwriters in order to obtain their agreement to reinstate the transit cover Signapore Europe.
>
> my sealed container no fwak 3372281 (seal no cc 00400) will be transported by Damco from sea shore transporta-

> tion pte ltd container depot at jurong—s'pore to the s'pore port authority for further shipment to Piracus [sic], greece. storage at a bonded warehouse located at agiou dionissiou Piraeus has been arranged as well as supervision by two retired armed policmen during trucking from port to warehouse (appr. 5 kms). fire and theft insurance has been effected for us dollrs, 30,000,000 with intertrust, a subsidiary of interamerican, Athens, 30% of which amount reinsured with Munich re.
>
> consignee of my container is mr. George Serafimides, manager of new Rotterdam ins. co. greece who is at the moment making enquiries in order to book a first class vessel for the trip Singapore-Piraeus, the captain of which willing to undertake supervision of (un) loading and stowage of my container with antiques.
>
> within the next weeks i trust therefore to be able to advise a satisfactory vessel. please confirm to my cable-address in Bangkok (knight-bangkok) that underwriters are willing to reinstate coverage for the above mentioned voyage subject to vessel being approved by underwriters."

Petitioner knew that the information which he conveyed to his broker was false in the following respects:

(1) George Papalios had never expressed interest in purchasing his collection in the amount of $30,000,000;

(2) Storage in a bonded warehouse in Piraeus had not been arranged;

(3) Fire and theft insurance for $30,000,000 had not been effected with Intertrust or any other insurance company; and

(4) Serafimides was not making inquiries to book a first-class vessel for the trip from Singapore to Piraeus.

The October 17 telex was received by Yerkes, and insurance

covering the 222 statues for an amount of $30,630,750 from Singapore to Piraeus was placed with the respondents herein.

Yerkes did not apprise the respondents' representatives that the London market had previously voided a policy of insurance for the same objects for a voyage from Singapore to Holland on the grounds of nondisclosure and misrepresentation in that the statues were replicas and highly-overvalued because he did not know of the prior voiding. Yerkes did not advise any of the respondents that petitioner had purchased the 222 statues for between $60,000 and $65,000 because he was unaware of that fact. Yerkes did not tell any of the respondents that petitioner's telex of October 17, 1982 contained misinformation because he did not know the facts contained in petitioner's telex were incorrect.

Although petitioner had approached a reputable freight forwarder, Damco, when he intended to send the buddhas and fablegods from Singapore to Holland, and again when he wished to ship them from Singapore to Marseilles, and had booked, on both occasions, ScanDutch vessels in liner service, on this occasion petitioner saw fit to allow his good friend Serafimides to arrange for the transportation of his cargo, albeit Serafimides had advised petitioner that he was unfamiliar with shipping and ship owners. Serafimides booked a Greek tramp, the ALIAKMON RUNNER, to carry the buddhas and fablegods from Singapore to Piraeus.

In late January, 1983 petitioner's container was laden on board the ALIAKMON RUNNER. On February 7 or 8, 1983, the ALIAKMON RUNNER sank in the Indian Ocean at approximately a position of latitude 10° 01′ north, and longitude 63° 18′ east, where the water is 2.5 miles deep.

The hull underwriters of the ALIAKMON RUNNER did not believe that the sinking was fortuitous and declined coverage under the hull policy. An action is now pending in Hamburg between the vessel owner and underwriters.

POINT I

The doctrine of *uberrima fides* should stand.

The argument that the centuries' old doctrine should be abrogated was never presented to either the district court or the court of appeals by the petitioner.

It is inappropriate to make it at this time. Recent readings of the Washington Post, New York Times and the Wall Street Journal leads one to the conclusion that any rule of law that requires "good faith" dealings in the market place should not be abrogated.

The case of *Puritan Insurance Co.* v. *Eagle S.S. Company, S.A.*, 779 F.2d 866 (2d Cir. 1985) is not in conflict with the decision of that court in the instant case. In *Puritan,* after a four-day bench trial, the district court found, as a matter of fact, that the nondisclosure of a prior loss was not material to the risk. The Court of Appeals for the Second Circuit recognized and restated the doctrine of *uberrima fides,* but in a two to one opinion refused to reverse the factual findings of the district court, saying:

> "Our task on appeal is to determine whether the trial court has applied the proper legal principles and whether its findings of fact are 'clearly erroneous'. If those findings are not 'clearly erroneous', they may not be disturbed. . . ."
>
> (p. 871)

This Court has expressly followed a policy of harmonizing the United States law of marine insurance with that of England. *Calmar S.S. Corp.* v. *Scott,* 345 U.S. 427, 442-43 (1953); *Queen Ins. Co. of America* v. *Globe & Rutgers Fire Ins. Co.,* 263 U.S. 487, 493 (1924); *see* G. Gilmore and C.L. Black, Jr., *The Law of Admiralty,* 55-56 (2d ed. 1975).

The English Marine Insurance Act of 1906 provides, in part:

"18.

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

British Shipping Laws, Vol. 10, §591, p. 590.

United States law is to the same effect:

> "It is well established that the parties to a marine insurance contract are held to the highest degree of good faith. Under this obligation, called *uberrimae fidei,* the party seeking insurance is required to disclose all circumstances known to him which materially affect the risk. *Btesh* v. *Royal Ins. Co., Ltd., of Liverpool,* 49 F.2d 720, 721 (2d Cir. 1931)."

Puritan Insurance Co. v. *Eagle S.S. Company, supra* at p. 870.

The doctrine of *uberrima fides* should not be abrogated.

POINT II

The District Court and the Court of Appeals applied proper standards in granting summary judgment.

In the case of *King* v. *Aetna Insurance Co.,* 54 F.2d 253 (2d Cir. 1931), the court had before it the question of whether an underwriter of a yacht could void the policy on the ground the assured failed to disclose that he had recently purchased the vessel for $2,500 when he applied for and received a valued policy of insurance for $40,000. The court found for the underwriter and said:

". . . we think any reasonable person must know that the fact that the vessel had just been purchased for $2,500 would materially affect the decision of an underwriter about to issue a $40,000 valued policy upon her. It is held that concealment of an overvaluation so excessive as to make the risk speculative vitiates the policy. Ionides v. Pender, L.R. 9 Q. B. 531; Thames & Mersey Marine Ins. Co. v. Gunford Ship Co., L.R. [1911] A. C. 529. The valuation of a vessel at sixteen times what she had just cost the insured likewise makes the risk speculative; the insured has less incentive to protect her than he would had he paid a sum some where near commensurate with the stated value.

While ordinarily the materiality of the concealment is a fact for the jury [Muller v. Globe & Rutgers Fire Ins. Co., 246 F. 759 (C.C.A. 2)], the evidence in the case at bar was so clear that we think the court should have held the policy vitiated and have granted a motion to dismiss the complaint. . . ."

(emphasis added) (pp. 254-255)

The United States District Court for the Southern District of New York in the instant case found:

"It seems obvious to this court that as a matter of indisputable fact a prior underwriter's voidance of a thirty million dollar insurance policy on antiquities of dubious origin on the grounds that the goods were 'grossly overvalued' and inauthentic would have been material to any subsequent underwriter's decision to accept the risk. (A-37)*

* * *

No reasonable juror could conclude, under the facts of this case, that defendants would not have declined to em-

*A- refers to pages in the Appendix to the petition.

> *brace plaintiff's requested thirty million dollar policy had they known of the prior London cancellation and of the incriminating contents of the telex from the London broker —at least not without subsequent opportunity for defendants to make their own investigation and perhaps to adjust the amount insured.* (A-38) (emphasis added)
>
> * * *
>
> Accordingly, faced with the undisputed fact that plaintiff failed to disclose, although he knew of, the London underwriters' cancellation and their stated reasons therefor, and the fact that no reasonable trier of fact could find that this information would not have been material to defendants' decision to take on the risk, this court determines that no genuine issue of material fact remains as to this non-disclosure to preclude a grant of summary judgment." (A-40)

In upholding the decision of the district court, the court of appeals found that the district court was cognizant that ordinarily materiality is a jury question, and stated:

> "Judge Motley recognized that the materiality of a non-disclosure is a finding of fact that ordinarily is a jury question. In this case, though, since the only possible outcome as a matter of law, even if a trial had been conducted, is in favor of defendants, Judge Motley was correct in granting summary judgment. See R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir. 1984); King v. Aetna Ins. Co., 54 F.2d 253, 255 (2d Cir. 1931). Indeed, it is precisely under these kinds of circumstances that summary judgment serves salutary purposes." (A-12)

In *Anderson* v. *Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986) this Court held that the standard for granting summary judgment "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict", and said:

> "The Court has said that summary judgment should be granted where the evidence is such that it 'would require a directed verdict for the moving party.' . . . And we have noted that the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard: 'The primary difference between the two motions is procedural.' . . . In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or *whether it is so one-sided that one party must prevail as a matter of law.*
>
> * * *
>
> [T]he judge must ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. . . . The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . ." (emphasis added) (p. 2512)

In *Celotex Corp.* v. *Catrett,* 106 S.Ct. 2548 (1986), this Court said:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' Fed. Rule Civ. Proc. 1. . . . Rule 56 must be construed with due regard not only for the right of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, *but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis."* (emphasis added) p. 2525

In the instant case the district court in granting respondents' motion for summary judgment, and the United States Court of Appeals for the Second Circuit in affirming the lower court's decision, followed the standards set forth by this court.

CONCLUSION

The application for a Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel

February 19, 1987

APPENDIX

Respondents' designation of corporate parents, subsidiaries and affiliates pursuant to Rule 28.1 of the Rules of this Court are as follows:

Respondent	*Designated Companies*
U.S. Fire Insurance Company	Xerox Financial Service, Inc. Crum & Forster Incorporated Constitution Reinsurance Corporation Navco Corporation
Insurance Company of North America	CIGNA Corporation CIGNA Holdings, Inc. Connecticut General Corporation
Centennial Insurance Company	Atlantic Mutual Insurance Company
Reliance Insurance Company	Reliance Group Holdings, Inc. Reliance Group Incorporated
Federal Insurance Company	The Chubb Corporation La Federacion Compagnia de Seguros, L.A. Seguros Illimani S.A. Bolivar Compania de Seguros del Ecuador
Royal Insurance Company of America	Royal Group, Inc.
Northwestern National Insurance Company	Armco Insurance Group Inc.
Highlands Insurance Company	Halliburton Company
Continental Insurance Company	The Continental Corporation

No. 86-1214

Supreme Court, U.S.
FILED
FEB 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FREDERICK W.A. KNIGHT,

Petitioner,

– against –

U.S. FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, CENTENNIAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, ROYAL INSURANCE COMPANY OF AMERICA, NORTHWESTERN NATIONAL INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, and CONTINENTAL INSURANCE COMPANY,

Respondents.

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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February 25, 1987

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ARGUMENT

I.

RULE 17 CONSIDERATIONS WARRANT REVIEW BY THIS COURT

Defendants assert there is "no special or important reason for granting of a writ in this case under Rule 17 of this Court's Rules." (Brief in Opposition, p. 1). However, several considerations embodied in Rule 17 warrant grant of a writ.

First, in the short time since it was decided in October 1986, this case has quickly become the leading case on summary judgment under Rule 56, F.R. Civ. P. To date, it has been cited in 24 reported cases in the brief period since its determination. We have had inquiries from numerous parties in other actions and no doubt it has been

relied upon in countless others. Indeed, Knight v. U.S. Fire, et al., 804 F.2d 9 (2nd Cir. 1986) is likely to become to "summary judgment" what International Shoe Co. v. Washington, 326 U.S. 310 (1945) is to "minimum contacts". It deserves the attention of this Court.

Second, the Second Circuit has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the district court as to call for this Court's supervision under Rule 17. The record of the proceeding herein discloses that the lower court scrutinized only the conduct of the assured, expressly reserving decision on the assured's claims of bad faith by the insurers until after decision on uberrimae fidei of the assured. This violated the substantive law which requires

"good faith" to be a two-way street, Puritan Ins. Co. v. Eagle S.S Co. S.A., 779 F.2d 866 (2nd Cir. 1985) and ignored the burden of proof, which is on the insurers. Contractors Realty Company, Inc. v. Insurance Company of North America, 469 F. Supp. 1287 (S.D.N.Y. 1979). In this connection, we take issue with defendants' argument that we urge the doctrine of uberrimae fidei to be abrogated or nullified (Brief in Opposition, pp. 1, 10). On the contrary, we seek review of a situation where the doctrine was applied to only one party and used as a tool by the other to defeat a prima facie case.

Moreover, the lower court violated the mandate of Rule 56, F.R. Civ. P. requiring that presumptions and references be drawn in favor of the non-moving party by ignoring the undisputed and conceded fact

that the insurers knowingly and intentionally omitted the prior cancellation as a ground for cancelling the policy, when they had full knowledge of it, and sua sponte finding fraud as to the sole basis for the decision when fraud had been neither pleaded nor proved.

Third, the court of appeals departed widely from the accepted and usual course of proceedings on review of summary judgment by writing new law, without legal precedent, on uberrimae fidei and ignoring two critical issues expressly raised on appeal: 1) waiver by the insurers and 2) the clearly erroneous and prejudicial finding of fraud by the lower court. Indeed, in connection with waiver, the court of appeals' decision (and lower court's) are in direct conflict with the Second Circuit's recent decision that an insurer cannot cancel a policy

on one ground and later cancel on another ground if that latter ground was known to the insurers at the time of cancellation and was not given as a ground for the cancellation. Luria Bros. & Co. v. Alliance Assur. Co., Ltd., 780 F.2d 1082 (2nd Cir. 1986). As stated by the lower court in denying reargument in this case:

> "The Luria court held that where an insurer originally refused to pay based on a specific defense, unless the insurer had no knowledge of the facts giving rise to a new and additional defense, he is bound by the original defense and all other grounds for avoiding liability are waived." (A-45)

Significantly, neither the issue of waiver nor fraud was addressed by defendants in opposition to the petition for a writ of certiorari.

II.

DEFENDANTS' COUNTERSTATEMENT OF THE FACTS IS REPLETE WITH DISPUTED FACTS AND IRRELEVANT AND PREJUDICIAL MATERIALS

Defendants devote most of their brief to a "Counterstatement of the Case," which they erroneously state contains facts which are "undisputed." (Brief in Opposition, p. 2) This is not the case - many of the alleged facts are in dispute.

Moreover, almost all of defendants' "facts" relate to issues which the lower court held involve genuine questions of material fact. These "facts" include the relatively low purchase price of the collection which the lower court found was "a fact of not much consequence to the subsequent insurers," (A-33), the removal of the collection from Thailand, in connection which the court

found "there is little indication even in their own depositions that prior violations of Thai export regulations would affect the risk of such a voyage [Singapore to Greece]" (A-34), and communications between Mr. Knight and his insurers regarding the sale and preparations for the transportation to Greece which the court found "involve similarly crucial and factually unresolved questions of materiality." (A-35).

Finally, defendants make highly prejudicial statements in connection with the sinking of the ALIAKMON RUNNER, which is the subject of litigation in Germany and was not part of this case. Indeed, defendants have admitted that after extensive investigation they know of no connection between Mr. Knight and the loss of vessel. Defendants' use of these statements and irrelevant "facts" in

their brief should be disregarded by the court.

Furthermore, defendants omit numerous facts of record which indicate bad faith, not good faith, on the part of the insurers. For example, defendants state there were sixty-six depositions (Brief in Opposition, p. 2) but fail to mention that plaintiff was denied access to materials obtained by the insurers their investigation due to unsubstantiated death threats. Based on counsel's unsubstantiated assertions, which were later withdrawn, the court permitted the insurers to withold information from the assured, without an in camera review.

Secondly, defendants state at p. 4 that "upon receiving the Lau report, London underwriters voided the policy ab initio ..." This is a gross misstatement and physical

impossibility as the Lau report was not received until well over a week after the notice of cancellation was given.

Third, defendants fail to mention that prior insurers' own agent in Singapore admitted to Mr. Knight that they "did not know the basis" upon which the cancellation was made "as we had been advised that only one piece seen by Mr. Lau was a fake."

These and other genuine issues of fact, all relating to materiality of the prior cancellation, entitle Mr. Knight to have his day in court.

III.

DEFENDANTS HAVE MISLED THIS COURT BY THEIR ARGUMENT BASED ON KING V. AETNA INSURANCE CO., 54 F.2d 253 (2d Cir. 1931), WHICH HAS BEEN DISTINGUISHED IN CIRCUMSTANCES SIMILAR TO THIS CASE

Defendants erroneously argue that the court of appeals applied the proper standard in granting summary judgment by referring to King v. Aetna Insurance Co., 54 F.2d 253 (2d Cir. 1931), the sole case relied upon by the district court. However, King has been distinguished in Rosenthal v. Poland, 337 F.Supp. 1161 (S.D.N.Y. 1972) on facts similar to those in this case. In King the court noted that there was no independent evidence of increased value over purchase price, stating:

> "The purchase price is of course not conclusive of the value, but certainly justifies an inference [of value], in the absence of anything to the contrary...." (Emphasis supplied). King at 254.

In Rosenthal the court addressed facts similar to those in King, but with a significant difference. The insured had purchased an old ferryboat for $2,850, the "Ferryboat Orange," and obtained insurance on it for $100,000. Following loss of the ferryboat, the insurers refused to honor the policy, alleging over-valuation and relying on the decision in King. The Rosenthal court discussed the King holding in depth and refused to follow it, stating that King was "readily distinguishable and not dispositive" because of "important factual differences" between the cases. Rosenthal at 1169.

The Rosenthal court specifically distinguished the King case on the ground that in King there was nothing to support the increased value over the original purchase price. In contrast, the court in the

"Ferryboat Orange" case had "substantial evidence that the true value of the [ferryboat] far exceeded the price paid by plaintiff..." Id at 1169.

In this case there was also substantial evidence that the collection was worth its insured value, a value far exceeding the original "very moderate prices." Mr. Veera, a well respected expert in Thai and Khmer artwork, had issued a Valuation Report appraising the collection at $30,307,500. This value had been corroborated by the deposition testimony presented to the court of two other experts in Thai and Khmer art, Mr. Sanong and Mr. Samporn, who had both made first-hand examinations of the entire collection.

This independent evidence of increased value over original purchase price

makes the reliance on King by the lower court and the defendants wholly misplaced. There is no legal basis for the court's decision and defendant's references to the dicta in King are misleading in light of the Rosenthal holding.

Plaintiff's independent evidence of record on value, together with the expert testimony, depositions of the assured and broker on materiality and insurers' admissions in the cancellation letters themselves, clearly present a sufficient disagreement to require submission to a jury, precluding a directed verdict under Federal Rule of Civil Procedure 50(a) and summary judgment under Rule 56.

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of certiorari, plaintiff respectfully submits that its petition should be granted.

Respectfully submitted,

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